

Decision _____

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Application of Pacific Gas and Electric Company (U 39 E) for Commission Approval Under Public Utilities Code Section 851 of a Restated License Agreement with IP Networks, Inc., and Level 3 Communications, LLC.

Application 13-01-001
(Filed January 2, 2013)

**DECISION GRANTING APPROVAL
UNDER PUBLIC UTILITIES CODE SECTION 851
OF RESTATED LICENSE AGREEMENT**

1. Summary

This decision grants the application of Pacific Gas and Electric Company (PG&E) for Commission authorization under Pub. Util. Code § 851¹ to enter into a Restated Master License and Irrevocable Right to Use (IRU) Agreement to permit use of utility support structures, optical fiber and equipment sites by IP Networks, Inc. (IPN) and Level 3 Communications, LLC.² This agreement will enable PG&E to obtain new fiber optics capacity for energy utility communication and control purposes in a cost-effective manner and IPN, with its merger partner Level 3 Communications, LLC, to obtain additional fiber optic capacity to expand its broadband telecommunications network.

¹ All statutory references are to the Public Utilities Code unless otherwise referenced.

² PG&E filed this application on January 2, 2013. In Resolution ALJ 176-3307 (January 10, 2013), we preliminarily categorized this proceeding as ratesetting and determined that no hearing is necessary. No protests were filed.

2. Background

2.1. The Restated License Agreement

Pacific Gas and Electric Company (PG&E) requests Commission approval of the Restated Master License and Irrevocable Right to Use (IRU) Agreement, and explains that this Agreement modifies the irrevocable license agreement between PG&E and IP Networks, Inc. (IPN) for use of optical fiber, utility support structures, and equipment sites that the Commission previously approved in Decision (D.) 02-07-026.

The Agreement also includes Level 3 Communications, LLC. PG&E states that on December 20, 2012, IPN and Level 3 Communications, LLC (Level 3), a California certificated telecommunications carrier, entered into a Merger Agreement pursuant to which, subject to the terms and conditions thereof, Level 3 will acquire 100% of the outstanding capital stock of IPN. The closing of the Merger Agreement is conditioned upon, among other things, the execution by PG&E and IPN of the Restated License Agreement and the Commission's approval thereof.

PG&E states that the basic arrangement agreed to by PG&E and IPN and approved by the Commission in D.02-07-026 remains unchanged. Specifically, the earlier IPN agreements allow IPN to install fiber optic cable on PG&E's towers, poles, and conduits. Bare legal title to all such cables immediately vests in PG&E, with IPN being granted a license to use a portion of the fiber strands in those cables and with PG&E retaining unrestricted use of the remaining fibers. In addition, PG&E receives monthly revenues based on IPN's revenues from the fibers it licenses from PG&E. IPN has installed approximately 70 miles of fiber in the San Francisco Bay area, and completed a 116-mile long project from Cottonwood to Eureka, and an 11-mile build in Eureka in

December 2011. The Cottonwood-Eureka project provides broadband to previously un-served or under-served communities and was partially funded through a grant from the California Advanced Services Fund.

Level 3 is a telecommunications carrier that already has four fiber optic IRU and dark fiber license agreements with PG&E. These include agreements from companies Level 3 has acquired including the Conduit Route License Agreement between PG&E and IXC Communications Services, Inc., the Optical Fiber Installation and IRU Agreement between PG&E and IXC Communications Services, Inc., the IRU Agreement for Optical Fiber Installations Between PG&E and Williams Communications, Inc., and the Dark Fiber IRU Agreement Between WilTel Communications, LLC and PG&E.

The changes to the IPN Agreements that PG&E, IPN and Level 3 have agreed to, subject to Commission approval, are as follows:

- Restructuring the payment methodology to an equivalent minimum annual fee with upward potential for revenue growth.
- Extending the term of the agreement from an initial term of 20 years (of which approximately 8 years remain) with two 5-year extensions, to a new 20-year initial term with two 10-year extensions.
- Restricting PG&E's use of its fiber in the cable to utility purposes only, other than the Cottonwood-Eureka route, in respect of which IPN will have a right of first refusal for any sales, leases or assignments proposed by PG&E. In exchange for these restrictions, Level 3 is granting PG&E a dark fiber IRU on other Level 3 fiber routes in Northern and Central California to use for utility purposes.

PG&E concludes its description of the Restated Agreement by describing the electric property potentially as:

- Land owned by PG&E in fee simple;
- Electric transmission towers and facilities;
- Electric distribution poles, conduits, and facilities;
- Electric transmission and distribution substations; and
- Telecommunication conduits and shelters.

As with the original IPN Agreements, no PG&E property is being sold or disposed of, and IPN and Level 3 will be permitted to occupy and use only a portion of PG&E's property and only to the extent such use is compatible with PG&E's use of such property for utility service.

2.2. Environmental Review

The California Environmental Quality Act (Public Resources Code Section 21000, et seq., hereafter CEQA), applies to discretionary projects to be carried out or approved by public agencies. A basic purpose of CEQA is to "inform governmental decision-makers and the public about the potential, significant environmental effects of the proposed activities." (Title 14 of the California Code of Regulations, hereinafter CEQA Guidelines, Section 15002.)

PG&E states that the proposed Restated Agreement provides for no new fiber-optic cables or other facilities other than as previously approved by the Commission in D.02-01-026 and the decision approving the CEQA review of the 2002 Agreement, D.03-01-069. No party objected to this explanation, and our review of this application found no such proposed activities. We conclude, therefore, that no CEQA review is required.

2.3. Ratemaking Considerations

PG&E states that any compensation received from IPN or Level 3 for electric transmission property will be accounted for pursuant to ratemaking directives of the Federal Energy Regulatory Commission, and compensation for electric distribution property will be treated as Electric Other Operating Revenue as approved by the Commission in D.09-07-035.

3. Discussion

Section 851 provides that no public utility “shall . . . encumber the whole or any part of . . . property necessary or useful in the performance of its duties to the public, . . . without first having secured from the Commission an order authorizing it to do so.” Since the Restated License Agreement would encumber PG&E property, we apply Section 851 in considering this application.³

The primary question for the Commission in § 851 proceedings is whether the proposed transaction is adverse to the public interest. In reviewing a § 851 application, the Commission may “take such action, as a condition to the transfer, as the public interest may require.”⁴ The public interest is served when utility property is used for other productive purposes without interfering with the utility’s operation or affecting service to utility customers.⁵

We find that our approval of the Restated License Agreement would serve the public interest. IPN’s and Level 3’s activities will not interfere with PG&E’s use of its property for utility purposes or with service to PG&E customers, and the property and facilities in a manner consistent with legal requirements. The

³ D.01-08-069.

⁴ D.3320, 10 CRRC 56, 63.

⁵ D.00-07-010 at 6.

Restated License is consistent with our public interest determination in D.02-07-026.

With its application, PG&E filed a complete copy of its Restated License Agreement and requested that the Commission hold that document under seal as provided in General Order (GO) 66-C. PG&E stated that the price and fee provisions are commercially valuable information that the Commission has previously authorized to be held under seal. PG&E appended to its application a public copy of the Restated License Agreement with the price and fee terms redacted. We find that PG&E has demonstrated that this information meets our standard for confidential treatment because of the commercially sensitive nature of this information.

4. Conclusion

For all of the foregoing reasons, we grant the application of PG&E pursuant to § 851, effective immediately.

5. Final Categorization and Need for Hearing

Based on our review of this application, we conclude that there is no need to alter the preliminary determinations as to categorization and need for a hearing made in Resolution ALJ 176-3307 (January 10, 2013).

6. Waiver of Review Period

This decision grants the relief requested in an uncontested matter. Therefore, pursuant to Rule 14.6(c), the period for public review and comment is waived.⁶

⁶ All Rule citations are to the Commission Rules of Practice and Procedure unless otherwise stated.

7. Assignment of Proceeding

Mark J. Ferron is the assigned Commissioner and Maribeth A. Bushey is the assigned Administrative Law Judge in this proceeding.

Findings of Fact

1. The Restated License Agreement will not interfere with PG&E's utility operations or service to PG&E customers.
2. No CEQA review is required.
3. Revenues to be received by PG&E based on the Restated License Agreement will be treated as required by the Federal Energy Regulatory Commission for transmission, and as Other Operating Revenue for distribution.
4. In appropriate cases, such as this, the shared use of utility property by energy utilities and telecommunications providers results in both economic and environmental benefits, by encouraging energy utilities to use their property productively and reducing the need for construction of project sites by telecommunications providers.
5. There is no need to alter the preliminary determinations made as to categorization of this proceeding and the need for a hearing made in Resolution ALJ 176-3307 (January 10, 2013).
6. PG&E's request to hold the complete copy of its Restated License Agreement under seal should be granted.

Conclusions of Law

1. PG&E must treat license revenues that result from the use of PG&E's non-transmission facilities and property as Other Operating Revenue, and must track these funds in an appropriate account.

2. PG&E should allocate revenues received from the Restated License Agreement of transmission property according to the applicable FERC orders and legal requirements.

3. Approval of the Restated License Agreement, subject to the conditions stated in this decision, serves the public interest.

O R D E R

IT IS ORDERED that:

1. The Amended and Restated Master License and Irrevocable Right to Use Agreements between Pacific Gas and Electric Company and IP Networks, Inc. and Level 3 Communications, LLC, as described in Exhibit A to the application, is approved today, subject to the limitations set forth below.

2. Within 60 days of execution of the final agreement, Pacific Gas and Electric Company must submit a copy by advice letter, and the price and fee terms may be redacted.

3. Pacific Gas and Electric Company must allocate license revenues that result from the non-transmission property and facilities to Other Operating Revenue and shall track these revenues in an appropriate account, unless the Commission directs otherwise in a future proceeding related to revenue sharing issues.

4. Pacific Gas and Electric Company's request that the Commission hold the complete copy of the Restated License Agreement under seal is granted.

5. This order is effective today in order to allow the parties to implement the agreements expeditiously.

6. Application 13-01-001 is closed.

This order is effective today.

Dated _____, at San Francisco, California.